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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, Wilbur Erskine,

Petitioners,

vs.

Harry W. Voss, Trustee in Bankruptcy of Wilbur Erskine,

Respondent.

No. 199

BRIEF OF RESPONDENTS.

JAMES T. WALKER,
HENRY B. WALKER,
Counsel for Respondents.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Inasmuch as petitioners have not filed a brief in this cause, we will give the court a brief statement of the case.

At the time of the bankruptcy of Wilbur Erskine, he owned real estate in excess of Twenty Thousand Dollars ($20,000.00); his wife, Mary E. Erskine was alive and living with her husband. Wilbur Erskine was adjudicated a bankrupt on the 20th day of December, 1920, in the United States District Court for the District of Indiana, he being at that time a resident of Evansville, Vanderburgh County, Indiana. Subsequently, on the 25th day of February, 1921, the respondent, Harry W. Voss, was duly elected and qualified as

Trustee in Bankruptcy of the said Wilbur Erskine and entered upon his duties as such Trustee and is still such Trustee in Bankruptcy.

Shortly thereafter, on March 21, 1921, the wife of Wilbur Erskine, Mary E. Erskine, died testate. By her will (Tr. pp. 6 to 9) she left all of her estate, real and personal, in trust to the respondent herein, Harold Taylor, as Trustee. Subsequent to the death of Mary E. Erskine, Harry W. Voss, Trustee in Bankruptcy, filed his petition claiming the entire interest in the real estate of the bankrupt, free from any claims of the Trustee of the deceased wife or the bankrupt (Tr. pp. 22 to 23); and thereafter, a written agreement was entered into between said Trustee in Bankruptcy and said Trustee under the will of Mary E. Erskine, and the bankrupt, providing that all parties would join in deeds of conveyance and that the Trustee in Bankruptcy would retain not less than one-fifth of the proceeds of the sales in his hands, subject to the final decision of the court as to whom would be entitled to said monies, and without prejudice to the rights of any of the parties (Tr. pp. 10 to 11).

Thereafter, the petitoners appeared in the bankruptcy court and filed their answers to the petition of the Trustee in Bankruptcy (Tr. pp. 23 to 25). On March 14, 1923, the Referee in Bankruptcy made his finding and rendered judgment in favor of the petitioner, Taylor, in the sum of Seventy-three hundred seventy-four dollars ($7374.00) and ordered the Trustee in bankruptcy to pay to the Trustee under the will that sum, representing one-fifth of the proceeds of the sale of the real estate sold by the Trustee in Bankruptcy pursuant to the agreement heretofore referred to. The Trustee in Bankruptcy, then filed with the Referee in Bankruptcy, his petition to review and revise the order of the Referee which petition the Referee certified to the District Court. (Tr. pp. 11 to 14). An April 24, 1923, the United States District Court for the Dis-

trict of Indiana denied the petition to review and approved the findings and order of the Referee in Bankruptcy. (Tr. p. 14). On June 18, 1923, the said Trustee in Bankruptcy filed in the United States Circuit Court of Appeals for Seventh Circuit his original petition to review and revise the said order of the District Court. (Tr. pp. 1 to 14).

On July 7, 1923, the petitioner herein filed a motion to dismiss the petition to review and revise (Tr. pp. 15 to 17) and on September 11, 1923, on motion of counsel for Trustee in Bankruptcy, the Circuit Court of Appeals ordered that certified copies of certain parts of the record in said cause be filed and made a part of the petition to review and revise. (Tr. p. 29). Subsequently, on June 20th, 1924, the Circuit Court of Appeals refused to dismiss the petition to review and revise of the Trustee in Bankruptcy and reversed the District Court. (Opinion of C. C. A. Tr. pp. 32 to 40 inclusive). On August 8th, 1924, the petitioners filed their petition for re-hearing. (Tr. pp. 42 to 45 inclusive) which on August 15th, 1924, was denied by the Circuit Court of Appeals. Thereafter, on November 10, 1924, a petition for certiorari was filed in the Supreme Court of the United States which was granted on March 2, 1925.

The question involved in this controversy is whether or not upon the adjudication of bankruptcy of Wilbur Erskine, the statutory interest of the wife of Wilbur Erskine at that time vested in his wife. The position of the Trustee in Bankruptcy is, in the first place, that the interest of the wife in her husband's real estate under the laws of the State of Indiana is conditional and depends upon her surviving her husband.

Fry vs. Hare, 166 Ind. 415, 420.

The only exception to this rule is in cases of judicial sales and then the act of 1875 (Sec. 3052 to 3055 inc. Burns Rev. Ind. St. of 1914) applies.

Chase vs. Van Meter, 140 Ind. 321.

Wright vs. Gelvin, 85 Ind. 128.

Lawson vs. DeBolt, 78 Ind. 563, 564.

Davis vs. Kelly, 179 Ind. 13, 97 N. E. 336.

In the case of *Davis vs. Kelly*, 179 Ind. 13, the court said: "The evident purpose of the Act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute."

In the case of *Lawson vs. DeBolt*, 78 Ind. 563, the husband made a voluntary assignment and the assignee sold the debtor's real estate. The court said in that case that "The sale by the assignee and confirmation by the court was a judicial sale." The court did not say that the assignment by the debtor was judicial sale.

And the same is true in the cases of bankruptcy prior to the Act of 1898. These cases decide that the adjudication in bankruptcy together with the transfer or conveyance by the Registrar in Bankruptcy to the Assignee in Bankruptcy was a judicial sale. These cases do not hold that the adjudication itself was a judicial sale.

Roberts vs. Shroyer, 68 Ind. 64.

Mattill vs. Bass, 89 Ind. 220.

The only way in which a bankrupt's wife's inchoate interest may be hastened is by judicial sale.

The Statutes of Indiana, Sections, 3052-3055 Burns' Revised Stat. of 1924, provide that if the husband's real estate is sold upon a judicial sale, the inchoate interest of the wife in the real estate sold shall become a vested interest in her without waiting for the death of the husband. Under the Bankruptcy Act, prior to the Act of 1898, the real estate of the bankrupt,

passed to the "Register" in Bankruptcy and he entered an order that it should be conveyed to the assignee and he thereupon executed a deed conveying the same to the "assignee" in bankruptcy to be administered as part of the Bankrupt's estate. This conveyance by the Register under the Bankruptcy Act has been held to be a judicial sale.

Under the Bankruptcy Act of 1898, the real estate of the Bankrupt passes to the Trustee "by operation of law" and no conveyance is made. The distinction seems as clear as would exist between a conveyance of real estate by an officer of Court made in compliance with a court's order and the passing of real estate "by operation of the law" of descent.

The petitioners herein have repudiated by their brief in the Circuit Court of Appeals and, as shown by the opinion of the Circuit Court of Appeals, any right which they might have acquired by virtue of the Judicial Sales Act of 1875. It is our opinion that there could be no judicial sale under the provisions of the Judicial Sales Act of 1875 until the actual Trustee's sale by order of the bankruptcy court at which time the bankrupt's wife would be entitled to have her inchoate interest set off to her.

In some jurisdictions and in Indiana, but for the Judicial Sales Act, it is possible for the Trustee in Bankruptcy to sell the real estate of the bankrupt, subject to the wife's inchoate interest.

It has been held that the inchoate right or dower is unimpaired by bankruptcy; and the Trustee in Bankruptcy takes the property of the bankrupt subject to the right of the widow to dower becoming consummate through the bankrupt's death.

Kelly vs. Miner, 252 Fed. 115.

Thomas vs. Woods, 173 Fed. 585, 19 Ann. Cases, 1080.

In Re Slack, 111 Fed. 523, 7 A. B. R., 121.

In Re Acretelli, 173 Fed. 121, 21 A. B. R., 537.

If such inchoate interest of the wife can never become consummate because of the wife's death prior to the death of the husband, it seems that the Trustee in Bankruptcy should be able to convey an absolute title to entire interest in the real estate of the bankrupt, just as the bankrupt himself before bankruptcy could have done in case the wife had not joined in the conveyance and subsequently died before his death.

Ohio Farmers Insurance Co. vs. Bevis, 18 Ind. App. 17.

Therefore, it is urged that the Trustee in Bankruptcy is entitled to the entire proceeds of the sale of such real estate.

The Petitioner has suggested that the Trustee in Bankruptcy did not pursue the proper Appellate Proceedure to take the case from the District Court to the Circuit Court of Appeals so that it would be unnecessary for him to file an appeal bond. As this court knows, the Bankruptcy Act provides that the Trustee in Bankruptcy shall not in any appeal, file his bond.

Emphasis has been laid upon the proposition that the respondent's orginal petition to review and revise to the Circuit Court of Appeals, should have been dismissed, inasmuch as respondent herein failed to follow the proper appellate procedure. Although the court below found that the proper procedure was not followed, respondent here does not concede that point. If counsel for respondent did misconceive the proper appellate procedure, it is urged that this Honorable Court follow the opinion of the Circuit Court of Appeals, below, that Congress, by the Act of September 6, 1916, at Section 4 thereof (39 Stat. L. 727) attempted to remedy such mistakes.

It is urged that the Circuit Court of Appeals properly construed said section which is as follows:

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out. But when such mistake or error occurs it shall disregard the same and take the action hich would be appropriate if the proper appellate procedure had been followed. (Sec. 4 of the Act of September 6, 1916, 39 Stat. L. 727, Sec. 1549a, U. S. Comp. Stats. 1916)."

That this view is firmly fixed in our practice is shown by the fact that this section has been re-enacted in the new code of February 13th, 1925, Section 10 under Section 240 of that act, Federal Statutes Annotated Pamphlet Supplement, April 1925, p. 91.

In the case of *Solu vs. Scintron and Aboy*, 237 Fed. 61, this section was construed and the court said, "In a case where the only difference between the two modes of seeking review is formal and where none of the substantial reasons for distinction between writs of error and appeals exist, we may properly disregard the objection. We will therefore proceed to consider the case on the merits."

The term "petition to review and revise" if added to the above quotation would only carry out the apparent legislative intent.

"This section does not abolish the distinction between writs of error and appeals but only requires that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review."

Gauzon vs. Compania General, etc., (1917) 245 U. S. 86, 38 S. Ct. 46.

In a petition to review and revise, only questions of law may be determined or brought before the Appellate Court. The respondent herein sought by his petition to review and revise nothing additional than a decision of a legal question. If he had proceeded by an appeal or writ of error to the Circuit Court of Appeals, rather than by a petition to review and revise, the question would have been one of law just the same, as nothing else is involved in this case. The matter was before the court on an agreed statement of facts and the entire record was before the court.

In the case cited by petitioners, *In re Loving*, 224 U. S. 183, 56 Law Ed. 725, which was decided in 1912, and prior to the enactment of the section herein involved, the court said in its opinion that the object of Section 24b of the Bankruptcy Act of 1898 is to give a review as to matters of law where facts are not in controversy. Such was the situation in the case at bar.

Furthermore the United States Supreme Court has held in construing Section 4 of the Act of September 6, 1916, that the purpose of said act was to discourage the necessity for abundant caution and to secure economy in the time of the courts and in making up and printing records. Mr. Chief Justice Taft said in the case of *In Esgee Co. vs. U. S.*, (1923) 262 U. S. 151, 43 S. Ct. 154, "Since the passage of the Act of September 6, 1916, which provides that no court having power to review a judgment or decree passed by another court shall dismiss an appeal because a writ should have been sued out, but that when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper Appellate procedure had been followed. The distinction is not important from the standpoint of the jurisdiction of this court. In the interest, however, of or-

derly procedure economy in time of both courts and in the making up and printing of the record, counsel should make every effort to select the proper procedure in review and not duplicate methods, out of abundant caution which the Act of 1916 makes unnecessary."

This section has been repeatedly upheld and in that regard may we cite the following cases:

Sucesores de Pyres Hermanos vs. Costa, (1922), 281 Fed. 439.

Swiftwater Plantations Co. vs. Davis, (1923), 287 Fed. 813.

Toyotisen Kaisha vs. Hartmann, (1918), 253 Fed. 422.

Cutting vs. Van Fleet, (1918), 252 Fed. 100.

Howard vs. Leete, (1919), 257 Fed. 918, 922.

Wilson vs. Union Tool Co., (1920), 265 Fed. 669.

"By reason of Section 4 of the Act of September 6, 1916, Chapter 448, 39 Stat. at Large, 727, Comp. Stat. Sec. 1649A, Fed. Stat. Ann. Supp. 1918, p. 421, this failure to adopt the proper Appellate Procedure is no longer fatal."

The distinction between the various modes of appellate procedure are not abolished by this section, and the rights which an appellant would have under the proper procedure are given him although the procedure itself was improper.

Ana Maria Sugar Co. vs. Quinones, (1920), 253 U. S. 247, 41 S. Ct. 110.

Section 1 of the Act of February 13, 1911, Chap. 47 (36 Stat. L. 901) provides for printed transcripts in cases of appeals or writs of error, although the act referred to mentions only reviews by writ or error or

appeal, *petitions to review under section 24b* of the Bankruptcy Act of 1898 are held to be the equivalent of an appeal for the purposes of this statute.

In re Burr Mfg. Co., 215 Fed. 898, 132 C. C. A. 238.

In construing the words "petition to review and revise" to be included within the terms "writ of error" or "appeal" in one case, a precedent has been set for such a construction of the act now in question.

The Circuit Court of Appeals in the case at bar included the term "petition to review and revise" within the meaning of the terms "writ of error" or "appeal", and it is respectfully urged that it did so properly.

The court's attention is called to other provisions of the United States laws. The first is the Act of September 24, 1789, 1 Stat. L. 91:

"No summons, writ, declaration, return, process, judgment, *or other proceedings in civil causes*, in any court of the United States, shall be abated, arrested, quashed, or reversed *for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect*, or want of form, except those which, in cases of demurer, the party demurring specially sets down, together with his demurer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The second is the Act of February 26, 1919, Chap. 48, 40 Stat. L. 1181, which is an amendment to Section

269 of the Act of March 3, 1911. This section shows the trend of Congress in regard to provisions providing against jeofails. This act reads as follows:

"All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The Act of September 24, 1789, Section 4 of the Act of September 6, 1916, and the Act of February 26, 1919, read together show the decided attitude of Congress toward technicalities in the courts and these statutes show the legislative intention to alleviate in all ways possible the effects of misconceived remedies and technical errors. These sections show, also, that Congress expects the Federal Courts to give substantial justice in every case, and not render decisions which will penalize litigants for technical mistakes made by their counsel.

The bankruptcy texts cite scores of cases where in order to be safe, litigants have sought a review in the Circuit Court of Appeals by appeal and also petitions to review and revise, and many instances are given where the courts indicated that they were in doubt as to which was the proper remedy. On numerous occasions the courts have properly passed upon the merits of the case before them without any question although the method of obtaining jurisdiction for the review is clearly wrong as they have done in

In re Hersey, 1 Fed. 2nd p. 5. (Advance Sheets, Nov. 13, 1924).

which has just come to respondent's attention.

Congress has always sought to obviate the miscarriage of justice to unfortunate litigants who have misconceived their method of seeking a review. Any one of the three Acts of Congress set out in this brief can, if broadly construed, amply justify the decision of the court below. For the convenience of this Honorable Court we set out the opinion of the Circuit Court of Appeals sought to be reviewed here by the writ prayed for. There is no argument which can be made by counsel which may sustain it which is equal to the arguments set out in the opinion itself.

Before Alschuler, Evans and Page, Circuit Judges.
Opinion of Page, Cir. J.

Wilbur Erskine, on December 20, 1921, when adjudicated a bankrupt, was a resident of the state of Indiana, and was married to his first wife, who died March 21, 1922, survived by her husband and two children.

Before the filing of the petition and adjudication, bankrupt owned, in fee simple, a considerable amount of real estate. His wife left a last will and testament, naming respondent Taylor trustee thereunder. Petitioner Voss was elected trustee of the bankrupt estate.

After the death of the wife, who had never joined in any conveyance, the real estate was sold, by stipulation between petitioner, respondent and bankrupt, all parties joining in the deeds.

The rights of respondent, as trustee under the will, were, by agreement of all of the parties, submitted to the court in bankruptcy, and its holding was favorable to the claim of respondent and bankrupt that, upon the filing of the petition and the adjudication in bankruptcy, the wife became vested with the same rights in the estate of the bankrupt that she would have had thereunder had she survived her husband.

This case is brought here by petition to review and revise, and a motion is made to dismiss on the ground that the case should have been brought here by appeal.

In support of his contention that this case is properly before this court on a petition toreview and revise, petitioner's main reliance is upon *Coder vs. Arts*, 213 U. S. 223. Because of the difference between the facts in that case and the case at bar, it is inapplicable here to support petitioner's contention, in that case, a creditor filed his claim, and it was allowed in bankruptcy. In connection therewith, and as a part thereof, he asked for priority, and the court held that the claim for priority was merely incident to the allowance of the claim. In the case at bar, respondent is not a creditor and is not seeking the allowance of a claim, as such. The same thing that respondent and bankrupt are seeking to do is to have carved out and set aside to them, as their property, free from administration in bankruptcy, a very considerable portion of the property which would otherwise be administered in bankruptcy and distributed to creditors.

This court in *re Breyer Printing Co.*, 216 Fed. 878, pointed out so clearly the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings" that it will serve no good purpose to add to what was there said. We there also discussed *Coder vs. Arts, supra*, and other leading cases wherein there is pointed out the distinction between "proceedings in bankrupty" and "controversies at law and in equity arising in the course of bankruptcy proceedings."

> "It seems clear, under the facts in the instant case, that "between the *trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants" (respondents) "on the other, concerning property in the possession of the *trustee* to be litigated in appropriate plenary suits, and not affecting directly administra-

tive orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors."

This is the language *in re Breyer Printing Co., supra.*

Counsel for petitioner rely upon *In re Peronio,* 220 Fed. 269, in which we held that the roceeding in the district court was of a summary nature, citing *In re Goldstein,* 216 Fed. 887,889, and *In re Breyer Printing Co., supra.* In the Goldstein Case, after distinguishing between summary and plenary methods of proceedure, we said:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable.* A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

That was a petition to review and revise, which raised only the question of the jurisdiction of the court to enter any order other than one of dismissal, after it was ascertained that there was a claim to property that was not merely colorable. The Petronio Case is of like character. There the District Court, in the face of the fact that its jurisdiction was disputed, and the further fact that a substantial and not a colorable claim was set up, proceeded to adjudicate the matter in a summary way, and therefore, both the Petronio and Goldstein Cases were reviews of summary orders in bankruptcy.

The other authorities cited by petitioner are in harmony with the authorities here cited.

The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the parties can not affect the method of procedure to procure a review.

For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an act of September 6, 1916 (39 U. S. Stats. at L. p. 727; Sec. 1649a U. S. Compiled Stats. 1916):

> "That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, supra, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with the appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are

lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms "appeal" and "writ of error" should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, especially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal.

Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana judicial sales act of 1875 (Secs. 3052 and 3055, page 178, Burns, 1914), but asserts,

> "That the rights and interests of his decedent (Mary E. Erskine) "in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the state of Indiana, being Sections 3014, 3029, 3037 and 2864, Burns' 1914," (being, respectively, Secs. 17, 27 and 35 of Acts of 1852, regulating descents, and Sec. 122 of the Decedents' Estates Act of 1881, for the settlement and distribution of estates).*

What respondent's argument means by a vesting upon adjudication by operation of law seems to be based upon three things: (a) That under Section 75a (5) of the Bankruptcy Act, the inchoate right of dower of the wife does not pass to the trustee; (b) That upon adjudication 'So far as the bankrupt's property was concerned, after the adjudication, he was, as it were, *civiliter mortuus*. His rights in the property were the same as though he were dead."; (c) That, by reason of *a* and *b*, there was vested absolutely in the constructive widow all of the rights that she would have had as

(a) May be conceded.

In *Bank vs. Sherman and Hickling vs. Sherman*,

101 U. S. 403, relied upon in support of proposition b, dower rights were not involved, but the court, commencing upon the effect of filing petition in bankruptcy, said:

> "The filing of the petition was a *caveat* to all the world. **Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. **If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus*."

We think that what was said *in re Dayton Coal & Iron Co.*, 291 Fed. 390, as to a part of the above quoations is reasonably applicable to all of it. The statement, "The Bankrupt became, as it were, for many purposes, *civiliter mortuus*," we think is said more as an illustration than as a judicial determination, and certainly should not be held to have any influence on the determination of the issue in this case. In *Platner vs. Sherwood*, 6 Johnson's Chancery Reports (N. Y.) 118, 123, it is said:

> "But the *civil death* spoken of in the books, is of two kinds: 1. Where there is a total extinction of the civil rights and relations of the party, so that he can neither *take* nor *hold* property, and his heirs succeed to his estate in the same manner as if he were really dead, or the estate is forfeited to the crown; 2. Where there is an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate to the crown. Of the first kind, are the cases of monks professed, and abjuration of the realm; all the other cases are of the second kind. Strictly speaking there are but *two* cases of civil death; those of a *monk professed*, and an abjuration of the realm."

The bankrupt here was not in either class. One against whom a petition in bankruptcy has been filed, and against whom adjudication has been had, is not under any disability of any kind or character, except that his right to deal with the property owned at the time of the filing of the petition is in some ways restricted. He is under no civil disability whatever. Even as to his property that passes to the trustee by operation of law upon adjudication as of the time of filing the petition he still may deal with it in certain ways. He has the power either before or after adjudication to contract with his creditors for a composition, (*Nassau Smelting & Refining Works vs. Brightwood Bronze Foundry Co.*,—U. S.—(Adv. Opinions Dec. 15, 1924), and such dealing is a matter of common and almost daily practice. In all cases, upon confirmation of composition, either before or after adjudication, the property that passes by operation of law to his trustee, again, by operation of law, passes from the trustee to him. (Sec. 70f Bankruptcy Act.) In most states, a bankrupt has exemptions, sometimes returnable to him in personal property, sometimes out of the real estate as a homestead. If a bankrupt is in any sense *civiliter mortuus*, he is not so in any such sense as would contribute or give effect to any section of the Indiana statute cited. Counsel say that cases construing Section 70a have uniformly held that the title of the trustee vests as of the date of adjudication, and that the wife's inchoate interests vest in her at the same time. No cases are cited. A wife's inchoate rights vest upon marriage or when the property is acquired after marriage. Unless there is some provision of some Indiana statute that operates to change the widow's inchoate right and increase it to a present fixed right, upon adjudication against the husband in bankruptcy, then there is not at the time of the vesting of the husband's estate in the trustee any change whatever in the wife's rights. The purpose of Section 70a is not to affect or change the wife's interest. Quite the contrary is true. It simply leaves a wife's interest

where it finds it. In *Porter vs. Lazear*, 109 U. S. 84, 86, the court cites English authorities, and says:

> "By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him."

In *Davis vs. Kelly*, decided by the Supreme Court of Indiana, February 2, 1912, and reported in 97 N. E. at page 336, discussing Section 3052 Burns Ann. Statute, a section of the judicial sales act of 1875, said (p. 337):

> "A proper construction of the act of 1875, as applied to the facts of the present case, requires the determination of the law prior to its passage. Under the statutes of 1852, a wife's inchoate interest in the real estate of her husband might become absolute in two ways: (1) Where a husband dies seized of real estate, the widow took by descent, as her husband's heir, under section 17 of the statute of descents, being section 2483 R. S. 1881. (Sec. 3014, Burns, 1908). (2) Where the husband's title was divested during coverture the wife not joining in any conveyance, the wife took, upon surviving her husband, not by descent, but by virtue of her marital rights, uder section 27 of the statute of descents, being section 3029 Burns 1908 (Section 2491, R. S. 1881). * * *
>
> "It is evident that, when a husband's land was sold at judicial sale prior to the taking effect of said act of 1875, and the husband subsequently died, leaving his wife surviving him, the wife took title in fee simple, not by descent, but by virtue of her marital rights under said section 27" (Section 3029 Burns). "* * Prior to that time, where a husband's land was sold at judicial sale, the inchoate interest of the wife did not become

absolute until the husband died, leaving the wife surviving him. During the husband's lifetime the entire title, together with the right of possession, was vested in the purchaser at the judicial sale. If the wife died during the husband's lifetime, her inchoate right was defeated altogether, and the title of the purchaser at the judicial sale became absolute. The purpose of the act of 1875 was to alter these rules of law by providing that the wife's interest should become absolute without reference to her survivorship of her husband. (Citing cases). The evident purpose of said act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in cases of judicial sales. To this extent and for this purpose the previous law was changed.

* * As the inchoate interest of the wife in the land of her husband in the conveyance of which she did not join vested in her and became absolute on the death of her husband prior to the taking effect of said act of 1875, under said section 27 of the statute of descents* it follows that under said act of 1875 the inchoate interest of the wife in her husband's land sold at judicial sale vests and becomes absolute under said section 27, supra, upon the consummation of such sale."

It seems clear from this decision that in so far as the Indiana statutes are here involved, the Indiana law, except as changed by the act of 1875, under which respondent here is claiming no rights, is exactly as it was prior to said act. Sections 27 and 17, referred to in the above case, are Sections 3029 and 3014 Burns, respectively, here relied on by respondent. Section 27 has reference to the rights of a "surviving wife." Section 17 disposes of the interests of the wife "if a husband die testate or intestate." There is nothing in any of the four sections, 3037, 3029, 3014 or 2864, that in the remotest degree discloses any intent on any

account to hasten or advance the time when the inchoate rights of the wife shall become absolute.

A very diligent search of the Indiana authorities has failed to reveal to us any case in which the courts of Indiana have held that the wife's inchoate interest has been advanced so as to become absolute prior to the husband's death, unless such cases have been based and bottomed upon the act of 1875. *Lawon vs. DeBolt*, 78 Ind. 563; *Wright vs. Gelvin*, 85 Ind. 128; *Chase vs. Van Meter*, 140 Ind. 321. And the same search has revealed to us many cases in which the Supreme Court of Indiana has held that the interest of the wife is conditional, depending upon her survivorship. *Fry vs. Hare*, 166 Ind. 415, 420.

We are of opinion that on the death of the widow all her right in this property was extinguished, and that no interest in the property passed to Taylor, her trustee.

The order of the District Court should be, and it hereby is, reversed, and the cause remanded for further proceedings in conformity herewith."

We respectfully submit this brief and pray that the judgment of the Circuit Court of Appeals be in all things affirmed.

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Attorneys for Respondents.

Taylor, Trustee vs. Voss.

No. 199.

ADDITIONAL AUTHORITIES SUBMITTED BY RESPONDENT.

The Petition to Review and Revise was the proper method of seeking review. Re. Rouse Hazard Co. 91 Fed. 96. Re Richards. 96 Fed. 936. Brady vs. McCann. 8 Fed. (2nd Ed) 995.

The inchoate right of dower should be treated as a lien or incumbrance. 19 Corpus Juris, 494 and cases there cited.

Even though the improper method of seeking review is taken the Court can consider the merits. Bryan vs. Bernheimer. 181 U. S. 188. Holden vs. Stratton, 191 U. S. 115. In re Pacific Co-op. League Stores. 291 Fed. 759. Courier Journal Ptg. Co. vs. Schaefer Meyer Brewing Co. 101 Fed. 699.

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